

RAJAMORGAN MARIMUTHU

A

v.

PP

COURT OF APPEAL, PUTRAJAYA

B

ABDUL MALIK ISHAK JCA

AZAHAR MOHAMED JCA

MOHD ZAWAWI SALLEH JCA

[CRIMINAL APPEAL NO: B-05-282-10-2011]

25 APRIL 2014

C

CRIMINAL LAW: *Penal Code - Section 302 - Appeal against conviction and sentence - Validity and correctness of sentence - Whether prosecution established prima facie case against accused - Whether accused should be called to enter defence - Whether accused should be convicted after defence was called - Whether appellate intervention warranted*

D

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Validity and correctness of sentence - Whether prosecution established prima facie case against accused - Whether accused should be called to enter defence - Whether appellate intervention warranted*

E

EVIDENCE: *Circumstantial evidence - Whether circumstances proved formed a chain of events - Whether there was irresistible conclusion of guilt of accused - Accused last seen with deceased - Whether created suspicions of guilt - Whether suspicions enough to prove case beyond reasonable doubt - Whether there was motive to murder*

F

In November 2009, one Thilagavathy ('SP9') had arranged the appellant's wife as the babysitter for her son, Haresvarra ('deceased'). However, the appellant's wife only took care of the deceased for two weeks because the deceased refused to be sent to the appellant's house. On 3 March 2010, SP9 sent the deceased to one Kavitha's ('SP8') house to be babysat by one Sathayee ('SP7'). SP9 had also told the appellant's wife to check on the deceased as she was concerned that her child might be uncomfortable at a stranger's house. According to SP7, the appellant came to her house at 9.45pm and took the deceased away. The deceased was seen crying and refusing to follow the appellant. SP7 tried to prevent the appellant from taking away the deceased but the appellant told her that he only intended to give the deceased some chocolates and would return him later. When the appellant returned to SP7's house after 10 minutes the deceased was seen to be weak and suffered breathing difficulty.

G

H

I

- A SP8 and her husband rushed the deceased to a nearby clinic. The appellant and his wife also rushed to the same clinic with SP8. The deceased was brought to Dr Teo Boon Chin's ('SP6') clinic. According to SP6, the initial examination showed that the deceased was already dead when taken to receive treatment. An
- B autopsy on the deceased's body confirmed that the deceased's cause of death was shock and haemorrhage due to liver injury. Subsequently, the High Court convicted the appellant under s. 302 of the Penal Code and sentenced the appellant to death. Aggrieved, the appellant lodged an appeal to challenge the validity
- C and correctness of the conviction and sentence. It was the prosecution's contention that the appellant allegedly stomped on the deceased at the playground. On the contrary, the appellant contended that the prosecution had ventured to substantiate the charge against the appellant only on the basis of circumstantial
- D evidence and there was no direct evidence implicating the appellant in the alleged murder of the deceased. The appellant submitted that the physical evidence adduced by the prosecution supported the fact that the deceased was assaulted by another person. The existence of another person's DNA found in the nail
- E clipping of the deceased was not attributed to the appellant and was not explained by the prosecution. The appellant further contended that the prosecution had failed to establish the chain of circumstances to make it complete and unerringly pointing the appellant with the alleged offence of the murder of the deceased.
- F The Deputy Public Prosecutor ('DPP') submitted, the fact that the appellant and the deceased being last seen together completed the chain of circumstances for the court to make a finding that it was consistent only with the hypothesis of the guilt of the appellant.

G **Held (allowing appeal; setting aside conviction and sentence; appellant acquitted and discharged):**
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

- H (1) In a case based on circumstantial evidence, the circumstances must unerringly lead to one conclusion consistent with the hypothesis of the guilt of the accused. Although the appellant was last seen with the deceased, it created suspicions of his guilt, but it was not enough to prove the case against the
- I appellate beyond reasonable doubt. Last seen evidence did not necessarily lead to an irresistible inference that the appellant committed the crime. Last seen evidence was only relevant

- evidence to complete the chain of circumstantial evidence. However a conviction could not be solely based on this piece of evidence. (para 27) A
- (2) The prosecution failed to establish, by positive evidence, any motive on the part of the appellant to murder the deceased. Although motive did not have a major role in cases based on eyewitness account of the incident, it was important in cases that rest entirely on circumstantial evidence. Absence of motive was a matter to be taken into account by the court. The fact that the appellant rushed the deceased to the clinic would neutralise any suggestion that the appellant personally wanted the deceased dead. (para 28) B
C
- (3) The circumstantial evidence relied upon by the prosecution coupled with the presence another person's DNA profile, gave rise to a reasonable inference that the appellant may not be the perpetrator. The trial judge misdirected himself when he failed to rule at the end of the prosecution's case that the prosecution had failed to establish a *prima facie* case. The circumstantial evidence presented by the prosecution was so lacking that the defence of the appellant should not be called at the first place, let alone convicted him even after the defence was called. (paras 32 & 34) D
E

Bahasa Malaysia Translation Of Headnotes

Pada bulan November 2009, Thilagavathy ('SP9') telah menguruskan agar isteri perayu menjadi pengasuh anaknya, Haresvarra ('si mati'). Walau bagaimanapun, isteri perayu hanya menjaga si mati selama dua minggu kerana si mati enggan dihantar ke rumah perayu. Pada 3 Mac 2010, SP9 menghantar si mati ke rumah Kavitha ('SP8') untuk diasuh oleh Sathayee ('SP7'). SP9 juga memberitahu isteri perayu untuk memeriksa keadaan si mati kerana bimbang anaknya mungkin tidak selesa di rumah orang asing. Menurut SP7, perayu datang ke rumahnya pada 9.45 malam dan mengambil si mati di sana. Si mati dilihat menangis dan enggan mengikut perayu. SP7 cuba menghalang perayu daripada mengambil si mati tetapi perayu memberitahunya bahawa dia hanya berniat untuk memberikan coklat kepada si mati dan akan mengembalikan si mati kemudian. Apabila perayu kembali ke rumah SP7 10 minit kemudian, si mati kelihatan lemah dan mengalami kesukaran bernafas. SP8 dan suaminya bergegas membawa si mati ke klinik berhampiran. Perayu dan isterinya juga bergegas ke klinik yang sama dengan SP8. Si mati telah dibawa ke klinik Dr Teo F
G
H
I

- A Boon Chin ('SP6'). Menurut SP6, pemeriksaan awal menunjukkan bahawa si mati telah meninggal dunia ketika dibawa untuk menerima rawatan. Bedah siasat ke atas badan si mati mengesahkan bahawa punca kematian si mati adalah kejutan dan pendarahan akibat kecederaan pada hati. Kemudian, Mahkamah
- B Tinggi telah menyabitkan perayu di bawah s. 302 Kanun Keseksaan dan menjatuhkan hukuman mati ke atas perayu. Terkilan, perayu merayu bagi mencabar kesahihan sabitan dan hukuman. Pihak pendakwaan menghujahkan bahawa perayu telah menghentak si mati di taman permainan. Sebaliknya, perayu menghujahkan
- C bahawa pihak pendakwaan telah mengesahkan pertuduhan terhadap perayu hanya berdasarkan keterangan mengikut keadaan dan tiada bukti langsung yang membabitkan perayu dengan pembunuhan si mati. Perayu menghujahkan bahawa bukti fizikal yang dikemukakan pihak pendakwaan menyokong fakta bahawa si
- D mati telah diserang oleh orang lain. Kewujudan DNA seorang yang lain yang didapati pada keratan kuku si mati tidak dikaitkan dengan perayu dan tidak dijelaskan oleh pihak pendakwaan. Perayu selanjutnya menghujahkan bahawa pihak pendakwaan telah gagal untuk mewujudkan rangkaian keadaan supaya lengkap dan tanpa
- E ragu-ragu, mengaitkan perayu dengan kesalahan membunuh si mati. Timbalan Pendakwa Raya ('TPR') menghujahkan, fakta bahawa perayu dan si mati dilihat terakhir bersama melengkapkan rantaian keadaan bagi mahkamah untuk membuat suatu keputusan bahawa ia adalah hanya selaras dengan hipotesis kesalahan perayu.
- F **Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman; perayu dilepaskan dan dibebaskan): Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:**
- G (1) Dalam kes berdasarkan keterangan ikut keadaan, keadaan tersebut hendaklah membawa kepada satu kesimpulan yang selaras dengan hipotesis kesalahan tertuduh. Walaupun perayu orang yang terakhir dilihat bersama si mati, ia membangkitkan
- H syak wasangka kesalahan perayu, tetapi ia tidak mencukupi untuk membuktikan kes terhadap perayu melampaui keraguan munasabah. Keterangan kali terakhir dilihat tidak semestinya membawa kepada inferens yang tidak dapat disangkal bahawa perayu melakukan jenayah itu. Keterangan kali terakhir dilihat
- I hanya bukti yang relevan untuk melengkapkan rangkaian keterangan ikut keadaan. Walau bagaimanapun sesuatu sabitan tidak boleh diasaskan semata-mata atas keterangan ini.

- (2) Pihak pendakwaan gagal membuktikan, dengan keterangan positif, sebarang motif pada pihak perayu untuk membunuh si mati. Walaupun motif tidak memainkan peranan utama dalam kes-kes berasaskan keterangan saksi yang melihat kejadian itu, ia adalah penting dalam kes-kes yang bersandarkan sepenuhnya kepada keterangan ikut keadaan. Ketiadaan motif merupakan perkara yang akan diambil kira oleh mahkamah. Fakta bahawa perayu bergegas membawa si mati ke klinik akan meneutralkan sebarang cadangan bahawa perayu secara peribadi mengkehendaki kematian si mati. A
B
- (3) Keterangan ikut keadaan yang disandarkan oleh pihak pendakwaan ditambah dengan kehadiran profil DNA seorang yang lain membangkitkan inferens yang munasabah bahawa perayu bukanlah pembunuh. Hakim bicara telah tersalah arah apabila beliau gagal untuk memutuskan bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* di akhir kes pendakwaan. Keterangan ikut keadaan yang dikemukakan oleh pihak pendakwaan adalah terlalu lemah hinggakan pembelaan perayu tidak sepatutnya dipanggil dari awal lagi, apatah lagi mensabitkan perayu selepas pembelaan dipanggil. C
D
E

Case(s) referred to:

- Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40 PC (*refd*)
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC (*refd*)
Magendran Mohan v. PP [2011] 1 CLJ 805 FC (*refd*) F
Mutar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ (Rep) 237 FC (*refd*)
PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC (*refd*)
Rishi Pal v. State of Uttarakhand 2013 (2) ACR 147 (*refd*)
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA (*refd*) G
Yap Boon Thai v. PP [2013] 1 LNS 1181 CA (*refd*)

Legislation referred to:

Penal Code, s. 302

- For the appellant - Murali Achan PE Achan (Kulasekar Kulasingam with him); M/s K Kulasekar, Achan & Assoc* H
For the prosecution - Andi Razalijaya A Dadi, DPP

Reported by Sandra Gabriel

I

A JUDGMENT

Mohd Zawawi Salleh JCA:

The Antecedents

B [1] This is an appeal against the judgment dated 29 September 2011 passed by the High Court at Shah Alam, Selangor, by which the court convicted the appellant under s. 302 of the Penal Code (“the Code”) and sentenced him to death.

C [2] The appellant was charged as follows:

Bahawa kamu, pada 3 Mac 2010 di antara jam 9.40 malam hingga 10.10 malam di Taman Permainan Kanak-kanak Pangsapuri Vista Damansara, Jalan Kenangan, Kampung Sungai Ayu Ara, 47400 Petaling Jaya, di dalam Daerah Petaling, di dalam

D Negeri Selangor Darul Ehsan, telah melakukan pembunuhan dengan niat menyebabkan kematian kepada Haresvarra a/l Karigalan No. KP: 080828-10-2553. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

E [3] Aggrieved, the appellant lodged this appeal to challenge the legality and correctness of the conviction and sentence.

F [4] We have heard Mr Murali Achan and Mr Kulasekar, learned counsel appearing for the appellant and Mr Andi Razalijaya A Dadi, learned Deputy Public Prosecutor (“DPP”) appearing for the Public Prosecutor. We have given our thoughtful consideration to the arguments advanced by them. We have also perused the appeal records of this case and closely scrutinised the evidence led by both the parties.

G [5] We are mindful that this is a factually based appeal. In the course of the submission before us, the DPP had reminded us the danger of interfering with the finding of facts of the trial judge, who had seen and heard the witnesses.

H [6] The basic principle which guides our courts in appeals against findings of fact is trite. An appellate court will not impeach the finding of facts by a first instance or trial court that saw and heard witnesses give evidence, except in certain very limited circumstances. An appellate court may, however, interfere in a case in which the reasons given by a trial judge are not satisfactory, or where it is clear from the evidence that the trial judge misdirected himself. Where a trial judge misdirects himself or

I

herself and draws erroneous inferences from the facts, an appellate court is in as good a position as the trial judge to evaluate the evidence and determine what inference should be drawn from the proved facts. Where therefore there is an appeal against the finding of facts, the burden upon the appellant is a very heavy one. An appellate court will only interfere if it finds that the court of first instance was clearly and blatantly wrong, or, as it is sometimes more elegantly stated, exceeded the generous ambit within which reasonable disagreement is possible. (See *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 (CA); *Mutar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237; [1982] 1 MLJ 184 FC; *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165).

[7] Having scrutinised the entire evidence adduced before the court, we are of the considered opinion that this is a case in which appellate intervention is warranted. On the facts of the present case it would be unsafe to allow the conviction of the appellant to stand. We are not satisfied that the prosecution had proved its case to the required standard. For that reason we unanimously allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged. We now give our reasons for so deciding.

Facts Of The Case

[8] Put in a short frame, the facts giving rise to the arrest and eventual conviction of the appellant is that in November 2009, Thilagavathy a/p Krishnamoorthy (SP9) had arranged the appellant's wife, who was staying at the same flat, as the deceased's babysitter. However, the appellant's wife only took care of the deceased for two weeks. The deceased refused to be sent to the appellant's house and cried and throw tantrum every time his mother attempted to coax him to the babysitter.

[9] Prior to the tragic incident, the appellant and his wife had expressed their desire to adopt the deceased as they did not bear any child of their own.

[10] On 3 March 2010, around 8pm, SP9 went for a job interview. She had sent her child, Haresvarra (deceased) to Kavitha a/p Tamilchelvan's (SP8) house to be babysitted by Sathayee a/p Mathuveeran (SP7). SP7 is the grandmother to SP8.

- A [11] SP9 had also told the appellant's wife to check on the child as she was concerned that her child might be uncomfortable at a stranger's house.
- B [12] According to SP7, the deceased played with SP7's great grandchildren, Karthik and a puppy before the appellant came and took the deceased away. The appellant came to her home at 9.45pm.
- C [13] SP7 stated that the deceased was seen crying and refused to follow the appellant. SP7 tried to prevent the appellant from taking away the child. The appellant told her that he only intended to give the child some chocolates and would return him later.
- D [14] When the appellant returned to SP7's house, the child was seen to be weak and suffered breathing difficulty. SP8 and her husband returned to the house and rushed the deceased to a nearby clinic. The appellant and his wife also rushed to the same clinic with SP8.
- E [15] The deceased was brought to Dr Teo Boon Chin's (SP6) clinic. According to SP6, the initial examination showed that the child was already dead when taken to receive treatment.
- F [16] Autopsy on the deceased's body was performed by the pathologists, Dr. Karunakaran Mathiharan (SP4). He confirmed that the deceased's cause of death was "shock and haemorrhage due to liver injury".
- G [17] It is on the basis of the aforesaid evidence that we shall endeavour to determine the issue canvassed by learned counsel for the appellant.

The Appeal

- H [18] The solitary contention advanced by learned counsel for the appellant on the merits of the case was that the prosecution had ventured to substantiate the charge against the appellant only on the basis of circumstantial evidence. There was no direct evidence implicating the appellant in the alleged murder of the deceased. The physical evidence adduced by the prosecution supports the fact that the deceased was assaulted by another person and not
- I the appellant.

[19] The DNA of the male person found in the nail clipping of the deceased was not attributed to the appellant and the presence of a female person was not explained by the prosecution. The deceased also suffered injuries to his lower abdominal and scrotal area. This scratch abrasion, according to SP4, was consistent with it being caused by a women's nails.

A

B

[20] Learned counsel for the appellant emphatically contended that the prosecution has miserably failed to establish the chain of circumstances so as to make it complete and unerringly pointing the appellant with the alleged offence of the murder of the deceased. Therefore, the appellant is entitled to an order of acquittal and the conviction and sentence imposed by the High Court should be set aside.

C

[21] Learned DPP on the other hand wholeheartedly supported the impugned judgment. According to him, the circumstance relied upon by the prosecution had been accepted by the trial court. They are as follows:

D

- (i) the appellant was last seen with the deceased;
- (ii) the deceased was crying when the appellant took him away;
- (iii) the deceased was not comfortable and will always cry when sighted the appellant; and
- (iv) the deceased suffered from breathing difficulty when the appellant returned him to SP7's house.

E

F

Findings Of This Court

[22] In this instant case, there is no dispute that the case for the prosecution is essentially based on the circumstantial evidence. The law on circumstantial evidence is well settled. In a plethora of decisions, the courts in our country have laid down the guidelines for appreciation of evidence in a case of this nature. In *Dato Mokhtar Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232, the Federal Court stated that:

G

H

Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the Court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman and Ors v. Public Prosecutor* [1982] 2 MLJ 306, 310).

I

- A [23] In *Magendran Mohan v. PP* [2011] 1 CLJ 805; [2011] 6 MLJ 1 the Federal Court discussed the status of circumstantial evidence and stated that:

The entire prosecution case rested on circumstantial evidence ...

- B The question, therefore, is whether the prosecution proved the guilt of the appellant beyond all reasonable doubt. In a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established. ... The circumstances must be satisfactorily established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. ... In other words when there is no direct witness to the commission of murder and the case rests entirely on circumstantial evidence, the circumstances relied on must be fully established ...
- C

- D ... If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the circumstances is broken, the accused is entitled to the benefit of the doubt. ... There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused ...
- E

... In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all probability the act must have been done by the accused and the accused alone.

F

- [24] It is clear from the cases cited above that in a case based on circumstantial evidence, the circumstances must unerringly lead to one conclusion consistent only with the hypothesis of the guilt of the accused and every incriminating circumstances must be clearly established by reliable and clinching evidence. Circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.
- G

- H [25] Coming back to the present case, SP7 testified that the appellant came to the flat and took the deceased away. After 10 minutes, the appellant returned with the deceased. According to SP7, the deceased was having the difficulty breathing and appeared weak. SP7's son, Subramaniam, questioned the appellant about the state of the deceased. Subramaniam suspected the appellant of doing something wrong to the deceased and demanded that he wait in the flat.
- I

[26] Learned DPP submitted that the fact the appellant and the deceased being last seen will complete the chain of circumstances for the court to make a finding that it is consistent only with the hypothesis of the guilt of the appellant.

[27] With respect, we disagree with the submission. The fact that the appellant was last seen with the deceased may have created suspicions of his guilt, but not enough to prove the case against him beyond reasonable doubt. It is trite that last seen evidence does not by itself necessarily leads to an irresistible inference that the appellant committed the crime unless the same is duly supported by other links in the chain of circumstances evidence unerringly pointing out the guilt of the appellant. It should also be noted that the last seen evidence is only relevant evidence to complete the chain of circumstantial evidence; however the conviction cannot be solely based on this piece of evidence. Dealing with the principle of last seen evidence, the Supreme Court of India in *Rishi Pal v. State of Uttarakhand* 2013 (2) ACR 147, had this to say:

16. In *Mohibur Rahman and Anr. v. State of Assam* (2002) 6 SCC 715, this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in *Arjun Marik and Ors. v. State of Bihar* 1994 Supp (2) SCC 372, this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in *Godabarish Mishra v. Kuntala Mishra and Another* (1996) 11 SCC 264, this Court declared that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In *Bharat v. State of M.P* (2003) 3 SCC 106; two circumstances on the basis whereof the Appellant had been convicted were (i) the Appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance. This Court held: ... Mere non-explanation

A cannot lead to the proof of guilt against the Appellant. The prosecution has to prove its case against the Appellant beyond reasonable doubt. The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the Appellant ...

B 20. Suffice it to say that even if we take the most charitable liberal view in favour of the prosecution, all that we get is a suspicion against the Appellant and no more. The High Court was in that view justified in setting aside the order passed by the trial Court and acquitting the Appellant of the offence of murder under Section 302 IPC. The order passed by the High Court deserves to be affirmed giving to the appellant the benefit of doubt. We accordingly dismiss the appeal filed by the appellant and discharge the notice of show-cause issued to him.

C

[28] In this instant case, the prosecution failed to establish by positive evidence any motive on the part of the appellant to murder the deceased. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstances evidence (See *Yap Boon Thai v. PP* [2013] 1 LNS 1181; [2013] 6 MLJ 236). Absence of motive in this case, therefore, is clearly a matter to be taken into account by the court. In so far as motive is concerned, SP9's evidence was much in favour of the appellant. She said that the appellant and his wife were very fond of the deceased and had expressed their desire to adopt the deceased. SP9 also stated that there were instances in which the appellant had helped her to send the deceased to seek medical treatment at the local clinic. The fact that he rushed the deceased to the clinic would neutralised any suggestion that he personally want the deceased dead.

D

E

F

G [29] It was the prosecution's contention that the appellant allegedly stomped on the deceased at Taman Permainan. However, there was no evidence of the appellant's footprints on the deceased's clothing. The police also did not retrieve any soil or bitumen from the crime scene to connect or implicate the appellant.

H

I [30] In our view, the prosecution's case was hampered with the existence of the DNA belonging to the 'unknown female' found in the deceased's finger nail clippings. There was no attempt by the prosecution to explain the presence of the female DNA profile. Several inferences could be made from the findings of such evidence. (See *PP v. Hanif Basree Abdul Rahman* [2008] 4 CLJ 1; [2008] 3 MLJ 161).

[31] SP4, during cross-examination, stated that injuries no. 10 to no. 14 found on the deceased's body were scratch abrasion caused by sharp object consistent with woman nails.

[32] We agree with learned counsel for the appellant that the trial judge misdirected himself when he failed to rule at the end of the prosecution's case that the prosecution had failed to establish a *prima facie* case against the appellant. The circumstantial evidence relied upon by the prosecution coupled with the presence of female DNA profile, give rise to a reasonable inference that the appellant may not be the perpetrator and a female could have injured the deceased. Furthermore, at any rate the chain of circumstantial evidence in this case is not so complete as to lead to the hypothesis of guilt of the appellant.

[33] Before we conclude, we must say that in dealing with the circumstantial evidence, there is always danger that conjecture or suspicion lingering on mind may take place of proof and therefore the court has to judge watchfully and ensure that the conjecture and suspicion do not take place of legal proof.

Conclusion

[34] After taking all the facts and circumstances of this case in consideration, we do not find ourselves in agreement with the findings arrived at by the learned trial judge. The circumstances evidence presented by the prosecution in this case was so lacking that the defence of the appellant should not have been called at the first place; let alone convicted him even after the defence was called.

[35] In the result, we allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged.

A

B

C

D

E

F

G

H

I